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In the Supreme Court of the United States

OCTOBER TERM 1945.

No. 1215

MAX D. GUSTIN,
Administrator of the Estate of
WILLIAM DUNCAN GRAHAM,
deceased,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF FOR PETITIONER.

M. C. HARRISON, of
HARRISON & MARSHMAN,
1300 Guardian Building,
Cleveland, Ohio,
Attorney for Petitioner.

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INDEX.

TABLE OF AUTHORITIES.

Cases.

Constitution.

Statutes.

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PETITION FOR WRIT OF CERTIORARI.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition for certiorari presents an important ramification of the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, and *West v. American Telephone & Telegraph Co.,* 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179. These cases, of course, hold that a Federal Court must follow the state law even though that state law consists only of a decision of an intermediate appellate court. In the present case the Circuit Court of Appeals relied upon a decision of an intermediate appellate court of the State of Ohio. However, this decision was not officially reported, and under a specific Ohio statute, Section 1483, General Code, it cannot be given recognition in any court.

The facts of the original cause of action, relatively unimportant to the present issues of this petition, will be summarized briefly.

Suit was brought by the petitioner upon a life insurance policy issued by the respondent. (R. 2.) The policy provided that loans made by the insurer to the insured against the cash surrender value of the policy should bear interest at "six per cent per annum." (R. 15.) The insurance also was extended, after default in premium payment, for a period of time determined by the cash surrender value less the outstanding loans against the policy, and the accrued interest upon those loans. (R. 15.)

The crucial issue in the trial court was whether the interest to be charged upon the loans against the policy was simple interest or compound. If the interest on the loans was to be compounded annually, then the extended period of insurance was not long enough to cover the death of the insured. If, however, the interest was to be simple interest, not compounded annually, then the insurance was in force at the death of the insured. The loan agreements, signed by the insured at the time of each loan, provided for compound interest (R. 99, 101, 103, 105, 107, 109, 111, 113), but were contested for want of consideration, since by the terms of the policy itself, the insured had a right to the advances. (R. 15.)

Upon these facts summary judgment was rendered for the defendant below and denied to the plaintiff. (R. 121.) The District Court held that the defendant insurance company was entitled to be credited with compound interest. (R. 115.) The Circuit Court of Appeals affirmed the judgment. (R. 129.)

The Circuit Court of Appeals, in its opinion (R. 137, 152 Fed. 2d 447), stated that, generally, the law of Ohio and the reasonable construction of the policy warranted reversal. However, the Court felt itself bound by the only case it found to the contrary. This case was *Johnson v. Pennsylvania Mutual Life Ins. Co.,* Cause No. 17113 in the Court of Appeals of Cuyahoga County, Ohio. (The Court of Appeals of Ohio is an intermediate appellate court between

the Ohio courts of original jurisdiction and the state Supreme Court.)

The *Johnson* case, however, was not officially reported, and according to Section 1483, Ohio General Code, it could not be given recognition or official sanction of any court within the state. Reliance upon the *Johnson* case by the Circuit Court of Appeals was therefore erroneous.

JURISDICTIONAL STATEMENT.

The judgment complained of was rendered by the Circuit Court of Appeals on the 13th day of December, 1945. (R. 129.) A motion for leave to file a petition for rehearing out of rule was filed on January 30, 1946. (R. 140.) A petition for rehearing was filed the same day. (R. 142.) On March 4, 1946, this Court, acting through Hon. Stanley Reed, extended the time for filing a petition for certiorari in this Court until May 10, 1946. On March 25, 1946, the Circuit Court of Appeals for the Sixth Circuit granted a motion for leave to file petition for rehearing but denied the petition for rehearing. (R. 144.)

The jurisdiction of this Court to review this decision is asserted under Section 240 Judicial Code; Title 28, Section 347 U. S. Code Ann. It is believed that the jurisdictional right to review this judgment is the same as that in *West v. American Telephone & Telegraph Co., supra.*

THE QUESTIONS PRESENTED.

The questions presented are:

(1) In determining the law of Ohio for application under the rule of *Erie R. Co. v. Tompkins, supra,* may the Circuit Court of Appeals rely upon an unofficial state court decision which courts within the state are forbidden by Ohio statute to recognize in any way?

(2) In construing the Ohio statute which forbids recognition of cases not officially reported, may the Circuit Court of Appeals ignore the only Ohio decision construing

the prohibition of the statute and rely upon the fact that the Supreme Court of Ohio on various occasions has dealt with such cases upon appeal without apparently being aware of said prohibitory statute?

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT.

The writ of certiorari should be allowed in this case because the Circuit Court of Appeals determined the law of Ohio from an unreported case, upon which the Ohio courts are specifically forbidden by statute to rely.

The result is that the unreported decision states the law of Ohio for the Federal Court but not for the state court. Thus the doctrine of *Erie Railroad Co. v. Tompkins,* instead of unifying the law in the Federal and state courts, in this instance diversifies it.

If the decision of the Circuit Court of Appeals is allowed to stand, the Federal Courts in Ohio will have different rules of Ohio law from those the state courts are permitted to employ. The decision of the Circuit Court of Appeals is clearly erroneous and should be reversed.

M. C. Harrison,

Attorney for Petitioner.

Dated May 6, 1946.

In the Supreme Court of the United States

OCTOBER TERM 1945.

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MAX D. GUSTIN,
Administrator of the Estate of
WILLIAM DUNCAN GRAHAM,
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Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

There are two opinions of the Circuit Court of Appeals and two memorandum opinions of the District Court. These are, in chronological order:

(a) Opinion of the District Court entered July 28, 1944 (R. 115). This opinion grants summary judgment to the defendant below and denies it to the plaintiff below.

(b) Memorandum opinion of the District Court overruling plaintiff's motion for a new trial (R. 119), filed October 3, 1944.

(c) Opinion of the Circuit Court of Appeals affirming the judgment below upon the authority of *Johnson v. Penn Mutual Life Insurance Co.*, an unreported Ohio decision, entered December 13, 1945 (R. 131), reported in 152 F. (2d) 447.

(d) Memorandum opinion of the Circuit Court of Appeals for the Sixth Circuit denying a petition for rehearing, entered March 25, 1946 (R. 144). In this opinion the Circuit Court of Appeals for the first time adverts to its reliance upon an unreported Ohio opinion—the present issue.

II.

JURISDICTION.

Review is sought of the judgment of the Circuit Court of Appeals for the Sixth Circuit entered on December 13, 1945. Review is sought under Section 240 of the Judicial Code, Title 28, Section 347, U. S. C. A.

It is believed that *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, supports the right of this Court to grant certiorari.

III.

SPECIFICATIONS OF ERROR.

The District Court erred:

(1) In granting summary judgment to the respondent and in failing to grant it to the petitioner.

The Circuit Court of Appeals erred:

(1) In relying upon an unofficial Ohio decision and affirming the judgment of the District Court.

IV.

STATEMENT OF THE CASE.

A statement of the facts of the case is included in the preceding petition under Section I thereof. To avoid repetition it is hereby adopted and made a part of this brief.

In summary, however, suit was brought by petitioner to recover benefits due under a life insurance policy. At the death of the insured, premiums were in default. Under the policy, nevertheless, the insurance continued in force for a period of time determined by the amount of cash

surrender value less loans on the policy and interest on those loans. If such interest was merely simple, and not compound, then the period of extended insurance continued to the date of death of the insured.

If however, compound interest were charged,—the extended insurance expired before the death of the policyholder.

The policy itself gave the insured the right to borrow at "six per cent per annum." The agreements he signed when he actually did borrow called for compound interest.

Summary judgment was granted to the insurance company by the District Court and affirmed by the Circuit Court of Appeals. Both declared that the insurance company could compound the interest. The Circuit Court of Appeals however reached this conclusion solely through reliance upon an unofficial Ohio case.

V.

ARGUMENT.

Summary of Argument.

As is clear from the opinion of the Circuit Court of Appeals, the general law of Ohio and the construction of the policy ordinarily would require the application of simple interest instead of compound interest. For this conclusion, it seems unnecessary to elaborate the opinion of the lower Court. (R. 131, 152 Fed. (2d), 447.)

The present discussion will show that the Circuit Court of Appeals improperly relied upon a decision of an intermediate Ohio Court which was not officially reported. The argument, therefore, can be outlined as follows:

(1) An examination of the opinion of the Circuit Court of Appeals.

(2) The words of the Ohio statute forbidding reliance upon an unreported case.

(3) Discussion of the cases construing the Ohio statute.

(a) The Decision of the Court of Appeals.

On December 13, 1945, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment below. (R. 129.) In its opinion (152 F. (2d) 447 at 451) the Court said:

> "While there is no decision of the Supreme Court of Ohio in a case substantially similar to this, we think the Ohio decisions, construed together with the applicable statutes, call for reversal of the judgment." (R. 137.)

Concluding that the Ohio law and statutes called for a reversal of the judgment, the Court then turned to the cases cited by the appellee insurance company, and said, p. 451:

> "The Ohio decisions relied on by the insurance company, with one exception, we view as not being in point upon the controlling question, which concerns the precise terms of the contract entered into by the parties. The exception is the unreported decision of the Court of Appeals of Cuyahoga County, Ohio, in *Johnson v. Penn Mutual Life Ins. Co.*, cause No. 455,583 in the Court of Common Pleas of Cuyahoga County, and cause No. 17,113 in the Court of Appeals of Cuyahoga County. The case was taken to the Supreme Court of Ohio on motion to certify the record, and also by filing an appeal as of right, upon the ground that a debatable constitutional question was involved. The motion to certify the record was overruled, and the appeal filed as of right was dismissed. 136 Ohio St. 39, 23 N. E. 2d 501. Under the principles declared in *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956, this decision of the inferior state court is binding upon the federal court. If it squarely determines the controlling question in the instant case, we follow it regardless of the logic of the considerations heretofore expressed." (R. 137.)

The Court thereupon decided that the *Johnson* case could not be distinguished. Its decision was held to be controlling and the judgment was affirmed. Quite obviously,

if the *Johnson* case is improper authority for determining the law of Ohio, the judgment should have been reversed.

We shall now demonstrate that it is such improper authority.

(b) The Statute Forbidding Reliance Upon the Johnson Case.

The Ohio General Code, Section 1483, provides for the reporting officially of the decisions of the courts of Ohio, including the Court of Appeals—(the intermediate appellate court under the Ohio judicial system). This Section of the Code (printed in full in the Appendix to this brief) reads, in part, as follows:

> "* * * Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."

It is clear that the case of *Johnson v. Penn Mutual Life Insurance Co.*, relied upon exclusively by the Circuit Court of Appeals, not being officially reported in accordance with the section of the Ohio Code just quoted, cannot constitute a statement of the law of Ohio. It remains only to be seen whether or not this statutory prohibition has in any way been modified or vitiated by judicial construction.

(c) The Cases Construing the Statute.

In summary, examination of the Ohio decisions discloses the following facts:

(1) The Ohio Supreme Court has never construed Section 1483, General Code.

(2) The only Ohio decision upon the statute itself is *Bevan v. Century Realty Co.*, 64 Ohio App. 58, a decision of the Court of Appeals for the Seventh Appellate District. Appeal Dismissed 136 O. S. 549. In this case, an officially reported decision, the statute was construed and held to mean what it says—that a case not officially reported cannot be recognized.

(3) Without discussing the statute, the Ohio Supreme Court has referred in various cases to unofficially reported decisions. Yet none of these cases actually rules upon the meaning of the statute.

We shall develop these points in order.

First: The state Supreme Court has never construed Section 1483, Ohio General Code. This is recognized in the memorandum of opinion of the Circuit Court of Appeals entered March 26, 1946 (R. 145). The Court there states:

> "• • • Section 1483, which relates to the reporting of decisions in the Supreme Court of Ohio and the various courts of appeals, contains a provision that 'Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state.' *This section has never been construed by the Supreme Court of Ohio* • • •" (Emphasis supplied.)

Second: The only Ohio case construing the statute is the case of *Bevan v. Century Realty Co., supra.*

The Ohio Constitution, Article IV, Section 3, provides that:

> "• • • whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. • • •"

In the *Bevan* case the judges of one Court of Appeals of Ohio were asked to certify their judgment as in conflict with the judgment of another Court of Appeals of Ohio. In refusing to certify, the court held:

> "*By the Court.* We are asked to certify this case to the Supreme Court because of alleged conflict with the conclusion of the Court of Appeals of the Eighth Appellate District in a case of *Kasunic, Admr., v. Euclid East Seventeenth Street Co.,* reported in 32 O. L. R., 261. While there is some difference in the

facts, our conclusions are not in accord. However, as we view it, there are two reasons why the motion should be, and is, denied:

"First: We followed the decisions of the Supreme Court cited in the original opinion, and, even if another Court of Appeals does not see fit to follow such decisions, it would be vain to sustain a motion which would require the Supreme Court to restate the law.

"*Second: Under the concluding sentence of Section 1483, General Code, recognition and sanction are not to be accorded to unofficially reported decisions.*" (Emphasis supplied.)

There is no other interpretation of this statute in the case law of Ohio. Therefore, it would seem that the Circuit Court of Appeals, in applying General Code, Section 1483, is bound by the interpretation given it by the Ohio Court in the *Bevan* case. *West v. American Telephone & Telegraph, supra.*

Third: In the memorandum opinion of the Circuit Court of Appeals entered March 25, 1946 (R. 147) the Court mentions cases where the state Supreme Court referred to *unreported* cases from the lower courts. For example, *Bauer v. Grinstead,* 142 O. S. 56.

However, in no case in the state Supreme Court, including the cases referred to in the opinion of the Circuit Court of Appeals, has the construction of Section 1483, Ohio General Code, been actually undertaken. In no case does it appear that the question was ever raised or assigned as error. Had the statute ever been in issue, surely the Supreme Court of Ohio would have mentioned it in its opinions. Thus these cases can scarcely be of any weight in determining the construction of Section 1483.

The case of *Bevan v. Century Realty Co., supra,* remains the only Ohio authority construing Section 1483, Ohio General Code.

The Circuit Court of Appeals in its memorandum opinion dismissing the petition for rehearing also relied upon

Bumiller v. Walker, 95 O. S. 344. Regarding this case, the Circuit Court of Appeals said (R. 147):

> "• • • The Supreme Court [of Ohio] also recognizes and gives official sanction to its own unreported cases. As stated in *Bumiller v. Walker,* 95 Ohio St. 344, 351, 'Ordinarily this court does not regard its unreported cases as judicial authority, for the reason that it is generally impossible to ascertain the concrete legal propositions involved and decided; but where a single question was involved, and that succinctly stated and decided, it cannot be said that such unreported case is wholly without influence.' While this decision was announced prior to the enactment of Section 1483, the rule as to unreported cases has never been modified or limited."

The foregoing statement of the Circuit Court of Appeals, that "the rule as to unreported cases has never been modified or limited," is completely in error. It has been and is modified by the subsequent passage of Section 1483, General Code.

Thus in no Ohio case, except the *Bevan* case, *supra,* is there any decision of the meaning and effect of Section 1483, Ohio General Code. The *Bevan* case held that the requirements of Section 1483, Ohio General Code, are mandatory.

The Circuit Court of Appeals has failed to follow the only Ohio decision construing this Ohio statute. Had it properly followed the *Bevan* case it would have been forced to discard the authority upon which it relied. By the words of its own opinion the Circuit Court of Appeals would have then reversed, rather than affirmed the judgment.

(d) Reasons for the Issuance of the Writ.

In every Ohio case decided by a Federal Court of original or appellate jurisdiction, the interpretation of Ohio law is almost invariably a crucial question. It has been held in the *West vs. American Telephone & Telegraph Co.*

supra, that the decisions of intermediate appellate courts in Ohio must be taken in the absence of a decision of the Supreme Court of Ohio, as the law of Ohio. There are, however, thousands of unofficial cases decided by Ohio intermediate courts. Are these decisions to be taken as authority by a Federal court, when their authority is specifically repudiated by statute?

It is submitted that it is a matter of grave concern to the Federal judicial system whether the decision of the Circuit Court of Appeals concerning the determination of Ohio law is or is not to be followed in the future.

Respectfully submitted,

MAX GUSTIN,
M. C. HARRISON,
HOMER H. MARSHMAN,
ALLAN HULL,
Attorneys for Petitioner.

APPENDIX A.

Section 1483, Ohio General Code:

"Reporter shall attend sessions of court; publication of court reports. When requested by the supreme court, the reporter shall attend its sessions and consultations and under its direction he shall report and prepare its decisions for publication. He shall also prepare for publication and edit, tabulate and index such opinions and decisions of any court of appeals as any such court may designate and furnish him for publication, and such opinions and decisions of any of the inferior courts of the state, as may be designated by him and approved by the chief justice of the supreme court.

"Assistants to reporter. Such official reporter may, with the approval and consent of the supreme court, appoint such assistant or assistants as may be necessary to carry on the work of his office, whose compensation shall not exceed two thousand dollars a year for each person so employed, to be paid out of the state treasury upon the warrant of the state auditor. No case in the courts of appeals shall be reported for publication except such as may be selected by the several courts of appeals, or by a majority of the judges thereof.

"Cases reported; preparation of syllabus. Whenever it has been thus decided to report a case for publication the syllabus thereof shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court; and the report may be per curiam, or if an opinion be reported, the same shall be written in as brief and concise form as may be consistent with a clear presentation of the law of the case. Opinions for permanent publication in book form shall be furnished to the reporter of the supreme court and to no other person. Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."

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OCTOBER TERM 1945.

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MAX D. GUSTIN,
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SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

ARNO BUSE TREMPER,
Attorney for Respondent.

G. W. [illegible],
R. M. MACARTHUR,
TREMPER, HINDS & FLOOD,
Guardian Building,
Cleveland, Ohio,
Of Counsel.

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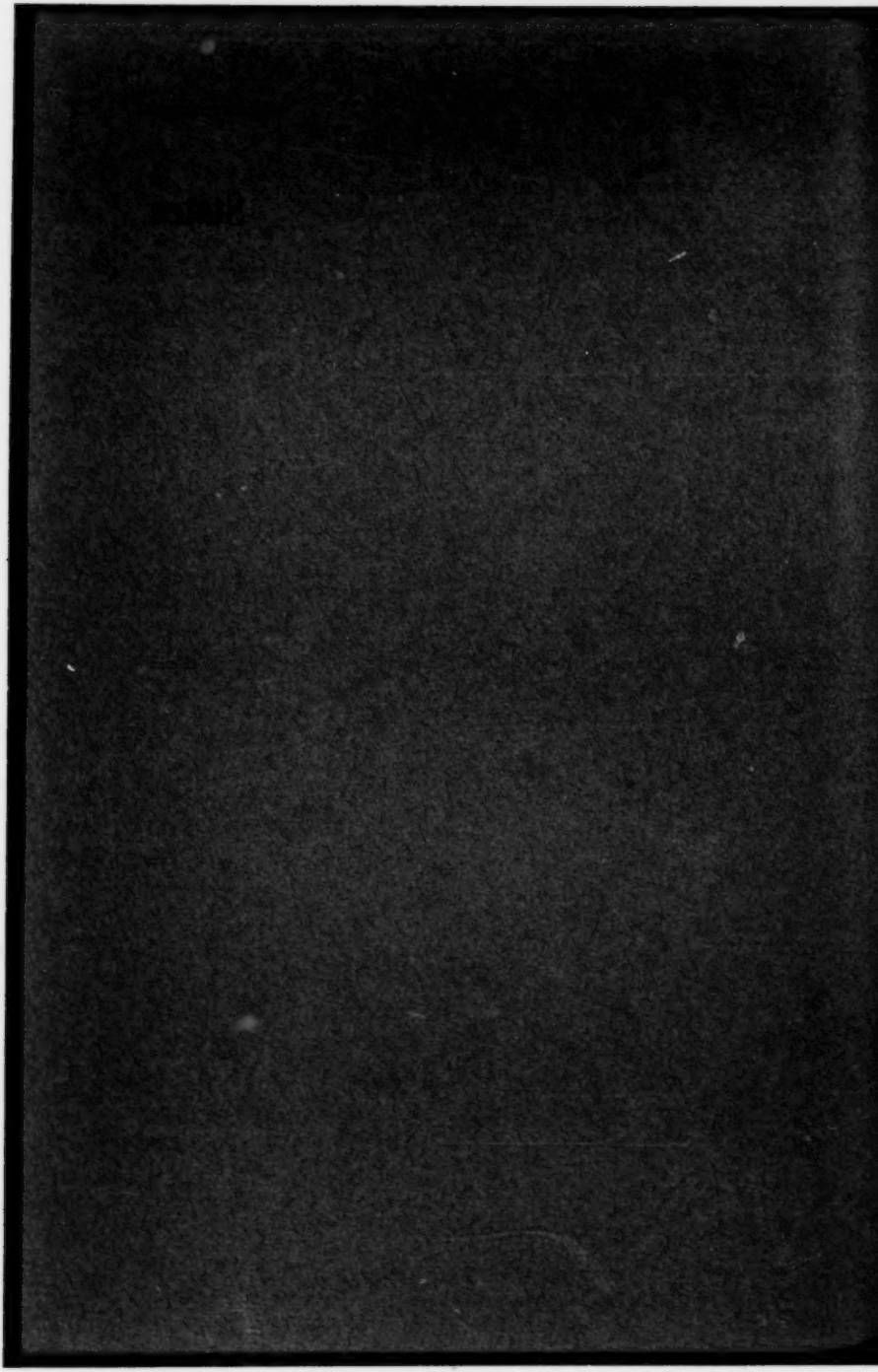

INDEX.

AUTHORITIES CITED.

Cases.

Publications.

Statutes.

Rules of Practice.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

NATURE OF THE CASE.

At page 2 of Petitioner's brief, there appears a summary statement of the case which does not sufficiently disclose the issues presented in the courts below.

The basic question is whether or not Respondent was entitled to charge interest as it did following universal practice among insurance companies, in the light of the insurance policy, a series of subsequent agreements in connection with loans, and the law of Ohio which controls the parties' contractual rights.

There are a number of grounds upon which the validity of Respondent's computation of interest may be sustained:

(1) The law fastens upon the insurer the duty to keep a policy in force and to avoid defaults.* The insured's non-

* See: Ohio General Code, sec. 9420(7):

"* * * It shall be further stipulated in the policy that *failure* to repay any such advance or *to pay interest shall not avoid the policy* unless the total indebtedness thereon to the company shall equal or exceed such loan value * * *." (Emphasis supplied.)

payment of annual interest requires either a default or an additional advance or loan by the insurer to meet the installment of interest when due. Respondent entered on its books additional loans covering unpaid annual installments of interest in this case. If Respondent was entitled to charge interest on these loans as the policy entitled it to do on all loans, the judgments below were correct.

(2) Upon the occasion of each loan (8 in number) made to the insured, he and Respondent entered into a formal loan agreement specifically providing for computation of interest in the way that it was actually computed.

(3) These loan agreements were supported by consideration because the policy gave Respondent the right to charge annual interest in advance, and in each loan agreement Respondent relinquished this right and, to the insured's advantage, allowed annual interest to be payable in arrears or currently.

(4) All but two of the loan agreements were entered into after the enactment of Ohio General Code, Section 9421-2, which specifically required the computation of interest in the way Respondent computed it here, and which statute reads:

> "In ascertaining the indebtedness due upon policy or premium loans, the interest, if not paid when due, shall be added to the principal of such loans and shall bear interest at the rate specified in the note or loan agreement."

(5) Since the insured entered into and executed eight loan agreements providing for computation of interest in the manner urged by Respondent, and each of these loan agreements included a statement of his loan account to the date thereof, the insured is now estopped from challenging the computation procedures and there has been a number of stated accounts between the parties.

The above are the principal points which, with others, were urged on the District Court and Circuit Court of

Appeals. Each of the points urged is supported by the Ohio law and the weight of authority in other jurisdictions.

DECISIONS IN THE COURTS BELOW.

Both parties moved for summary judgment in the District Court. The motion of Defendant-Respondent was granted.

In his memorandum opinion, District Judge Jones, for many years an Ohio Common Pleas Court judge and judge of the Northern District of Ohio, pointed out that Respondent's computation of interest conformed to the series of loan agreements, that their language indicated interest was to be paid each year or the amount thereof added to the total loans against the policy, and that the insured knew how computations of interest were being made and made no objection. Judge Jones, in his memorandum opinion overruling motion for new trial, found there was valid consideration for the loan agreements in the relinquishment of Respondent's right of collection of interest in advance. The Judge remarked: "The cases cited by the plaintiff (Petitioner) in support of his motion for a summary judgment do not convince me that such is the law in Ohio under the facts of this case." It is to be noted (R. 115) that the District Judge decided the motions for summary judgment without considering the affidavits by which the case of *Johnson v. Penn Mutual Life Ins. Co.,* was presented. Consequently, this case, which Petitioner now claims cannot properly be considered by the Circuit Court of Appeals, was avowedly not a factor in the District Court's decision.

It is Respondent's contention that the decision of the Circuit Court of Appeals, on the questions of consideration for the loan agreements, on the applicability of Ohio General Code Section 9421-2, and on the issue of estoppel, is at variance with Ohio law as well as with previous decisions of the same court (Cf. *Johnson v. Penn Mutual Life Ins. Co.,* 31 F. Supp. 394, aff., 6 Cir. 108 F. (2d) 1014, mem.,

where the issue in the present case was presented; *State Mutual Assurance Co. v. Briscoe,* 6 Cir. 107 F. (2d) 977, 979, and *Moss v. Aetna Life Ins. Co.,* 6 Cir., 73 F. (2d) 339, both holding that a loan agreement becomes an executed contract when the indebtedness exceeds the loan value and hence no consideration is necessary to support such agreement).

The Ohio law does not present a precedent for the present case in all its issues. However, on several issues, which would require disposition of the case in Respondent's favor, there is sufficient settled Ohio law to support the result reached by the Circuit Court of Appeals in this case.

It is to be expressly noted that the opinion of the Circuit Court of Appeals as distinguished from the result was not shared by Circuit Judge Simons, who limited his concurrence to the judgment, namely, affirmance of the judgment for Respondent. This implies that Judge Simons agreed with District Judge Jones, but did not share the limited basis of decision expressed by Circuit Judge Allen and to be implied by the silence of Circuit Judge Hicks. Thus, it is by no means clear that if the point were raised, the Circuit Court of Appeals would limit its ground for decision to the unreported case of *Johnson v. Penn Mutual Life Ins. Co.*, which Petitioner now claims must be ignored because of Ohio General Code, Section 1483.

Petitioner did not urge the application of Ohio General Code Section 1483 in the District Court, nor in the Circuit Court of Appeals until after the decision had been rendered. This statute, which has been in force since 1919 —some 28 years, was first urged by Petitioner on rehearing. Circuit Judge Allen, who wrote the principal opinion and that on rehearing, was a Judge of the Ohio Supreme Court for twelve years during which the statute in question was in force, and since that time has had frequent occasion to deal with Ohio law. It would seem to be specious criticism for Petitioner to argue that Circuit Judge Allen is

not thoroughly familiar with the Ohio law on this subject, the uniform attitude of Ohio Supreme Court judges and Ohio Courts of Appeals judges toward this statute, as well as with the wide publicity given the statute in the literature, and discussions of this subject which have issued from or taken place in various bar association and other professional groups in the State of Ohio.

Further discussion of Ohio General Code Section 1483 follows.

OHIO GENERAL CODE, SECTION 1483.

This statute, striking as it does at the root of jurisprudence, namely, the principle of precedent as expressed in the doctrine of *stare decisis,* and infringing upon the inherent power of courts to make rules, seems on its face to be so unreasonable and unenforceable as to be a nullity. But this conclusion is not necessary if the statute, as it must under Ohio law, (*State v. Smith,* 123 O. S. 237, 174 N. E. 768; *Maxfield v. Brooks,* 110 O. S. 566, 102 N. E. 225) be considered *in pari materia,* its purpose, and related statutes taken into account.

Little need be added to the views of Circuit Judge Allen as expressed on rehearing (Record, pp. 145-148). Judge Allen by reason of long experience on the Ohio Supreme Court is familiar with the implications of this statute and the whole problem.

There are several considerations which Respondent offers in addition to Judge Allen's analysis.

Respondent did not present to the Court a list of the sources, in Ohio legal literature, of material pointing out that this statute, being unworkable if literally applied, has been almost unanimously ignored by common consent of the Ohio Bench and Bar. Obviously the presence of this statute in the Ohio General Code has given rise to considerable discussion and debate. See, besides "The Unofficially Reported Case as Authority," Young, 1 O. S. U. L. J. 135

(Record, p. 146) which was referred to by Judge Allen, but not cited to the Court by Respondent, the wide publicity given the statute and the tacit understanding that it should be ignored as unworkable and not literally applied, appearing in: Curtiss, 5 U. Cin. L. Rev. 385, at pp. 389-393 (1931); Trautwein, Ohio Courts and The Reports of Their Decisions (1933), 7 U. Cin. L. Rev. 60, esp. p. 65; Schnee, Reporting Appellate Opinions (1932); 5 Ohio State Bar Assn. Reports, 343, esp. p. 346; 37 Ohio Law Reporter 129 (1932); Feazel, Ohio Case Law (1926), 1 Ohio Jur., p. xv, esp. at pp. xxii-xxiv; Cleveland (Ohio) Bar Association Journal, vol. 10, No. 12 (1939), p. 188.

The pertinent part of the statute (O. G. C. Sec. 1483) was originally promulgated in 1915 (four years before the statute) as part of Rule XII, Rules of Practice of Courts of Appeals of Ohio (5 Ohio App., p. x). However, in 1935, Ohio General Code, Sec. 12223-47 was enacted, empowering "the Courts of Appeals" to "make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the Supreme Court" and which "the Supreme Court may alter and amend such rules and make other and further rules, from time to time as is deemed necessary, for regulating proceedings in any of the courts of the state, * * *." Responsive to that statute, in 1935, the Ohio Courts of Appeals promulgated rules, superseding those of 1915, in which the pertinent part of previous Rule X was omitted. To date the Courts of Appeals Rules do not include any provision for ignoring precedent, and the Supreme Court has not exercised its prerogative under O. G. C. Sec. 12223-47 to impose such a rule upon the Courts of Appeals. Moreover, for many years the statute urged by Petitioner, O. G. C. Sec. 1483, was superseded by O. G. C. Sec. 12248, which required a Court of Appeals to state the ground of its decision of reversal, which latter statute has

been superseded, in 1935, by O. G. C. Sec. 12223-21, which, in part, reads:

> "All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the error or errors found in the record upon which the judgment of reversal is founded."

Concurrently, first, O. G. C. Sec. 12273, and later O. G. C. Sec. 12223-39, were in force; the latter reads:

> "The Court of Appeals or Common Pleas Court so reversing a judgment, upon the request of either party, shall specify in writing the ground or grounds of such reversal, which shall be filed and kept with the papers in the case."

Another ground for the interpretation by the Circuit Court of Appeals, of O. G. C. Sec. 1483, which Respondent did not submit to that court, is the settled principle that a statute which is unworkable, productive of a ridiculous or absurd result, or otherwise unreasonable, is not within legislative powers, is unconstitutional, and unenforceable. This has been the Ohio rule since *Slater v. Cave*, 3 Ohio St. 80, which, at pp. 83-4 holds:

> "It is not necessary to refer to precedent to sustain the position that where the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject-matter, there arise collaterally any absurd consequences, manifestly contradictory to common reason, the obvious intention of the law must prevail over a literal interpretation, and it is even said that provisions leading to collateral consequences of great absurdity or injustice, may be rejected as absolutely void."

The construction contended for would nullify the rules of *res adjudicata*. Parties could litigate a cause of action to a conclusion, either in the trial or appellate court, in Cuyahoga County, Ohio, and if the Supreme Court re-

porter in the first instance, and the Court of Appeals in the second instance, failed to have the decision and opinion officially reported, there would be nothing to prevent litigating the cause of action all over again, in any other county of the state. This would necessarily be true, because judgment in Cuyahoga County could not "be recognized by and receive the official sanction of any court within the state."

Another point not urged to the Circuit Court of Appeals was that Petitioner's claims for the statute, besides nullifying the doctrines of *res judicata* and law of the case, would upset the fundamental rule of jurisprudence that "a court of record speaks only through its journal." *Squire v. Guardian Trust Co.*, 144 O. S. 266. The data upon which the Circuit Court of Appeals relied for determination of the Ohio law on the precise issue presented was not an opinion, *but was the journal entry and record* of the Court of Appeals for Cuyahoga County, Ohio (R. pp. 137, 60). The recent view of the Ohio Supreme Court, as stated in *Squire v. Guardian Trust Co., supra,* places a court's journal entry on a higher plane than its opinion, apparently without regard to whether the opinion is published, or if so, whether or not officially published. At p. 271, the Ohio Supreme Court, in determining the holding of the Court of Appeals, ignored pertinent expressions in the opinion and held that the Court would, as it "must," confine itself to the judgment entry of the Court of Appeals. And *Coffman v. Coffman*, 76 Ohio App. 330, 333, holds:

> "We can not look to the opinions of the court for refutation of the duly entered findings upon its journal."

Moreover, the journal of a Court of general jurisdiction imports absolute verity. *State ex rel. Kriss v. Richards*, 102 O. S. 455, 132 N. E. 23.

Respondent pointed out to the Circuit Court of Appeals that the Ohio Supreme Court has recognized unofficially reported Ohio cases on innumerable occasions. This recognition takes three forms. First, *Feeman v. State*, 131 O. S. 85, 89, states:

> "Where opinions of the lower courts are available this Court has passed a rule requiring plaintiffs in error to submit the opinions of the lower courts with their briefs; * * *"
>
> (See Ohio Supreme Court, Rules of Practice, Rule II, Sec. 2 (e), Rule VII, Sec. 2 (f), and Sec. 6, Rule VIII, Sec. 3 (e), and Sec. 10, 130 Ohio St. lxx, lxxv, lxxvi, lxxvii, lxxviii.)

Obviously, this requirement results, in the great majority of cases, in the Ohio Supreme Court's consideration of opinions which are not reported at all. This is because the usual time elapsing before an Ohio appellate court decision is officially published, makes it impossible that such opinions required to be submitted to the Ohio Supreme Court for consideration can be officially published opinions. Second, there are numerous instances in recent opinions of the Ohio Supreme Court where the court has cited unofficially reported cases. (For examples, see Appendix A.) Third, and most important, the Ohio law permits a Court of Appeals, upon finding its decision in conflict with that of another Ohio appellate court, to certify the case to the Ohio Supreme Court for decision. On numerous occasions, the Ohio Supreme Court has noted that the Ohio appellate case, upon which the determination of conflict was based, was an unofficially reported or an unreported case. (For examples, see Appendix B.)

Respondent did not point out to the Circuit Court of Appeals that reference to the most recent volumes of the official Ohio Appellate Reports, disclose very numerous instances in these volumes where Ohio Courts of Appeals, for seven of the nine judicial districts, have cited and relied upon either unreported Ohio opinions or unofficially

reported Ohio opinions. The large number of these instances may be noted, under the heading "Ohio Law Astract" in Shepard's Ohio Citations (March, 1946) Vol. XXXVIII, No. 1, for the years 1945 and 1946. (For examples, see Appendix C.)

This frequent and settled practice of the Ohio Supreme Court and Ohio Courts of Appeals of citing unreported or unofficially reported Ohio cases, (which practice has been carried on since the decision on which Petitioner relies), and the omission or refusal of the Ohio Supreme Court to attempt to enforce Ohio General Code, Sec. 1483, makes applicable the Ohio law that a long established and uniform practice is an authority of but little, if any, less weight than an adjudication to the same effect. *State v. Ridgeway,* 73 O. S. 31, 76 N. E. 95.

ABSENCE OF GROUNDS FOR ISSUANCE OF WRIT OF CERTIORARI.

None of the usual grounds for issuance of a writ of certiorari is present in this case. Petitioner does not claim any "special and important reasons" for the review sought. This Court's Rule 38(5)(b) suggests that a writ may be allowed where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." This basis for a writ is not present here and this fact may be determined with almost mathematical precision. Respondent cited to the Circuit Court of Appeals numerous cases where the Ohio Supreme Court has cited and given full weight to unofficially reported Ohio cases. Respondent has herein indicated a large number of instances where Ohio Courts of Appeals have ignored the statute upon which the petitioner relies.

Respondent suggests that whether or not the Circuit Court of Appeals decided an "important question of local law in a way probably in conflict with applicable local

decisions," must be determined in the light of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, and cases following it. The very recent case *Guaranty Trust Co. v. York*, 326 U. S. 99, at p. 109, states:

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a Federal Court instead of in a State Court a block away should not lead to a substantially different result."

The present case was instituted in the Court of Common Pleas of Cuyahoga County, Ohio (R. p. 2) and was removed to the Federal Court, on the grounds of diversity of citizenship. Hence, the criterion of *Guaranty Trust Co. v. York, supra,* has unusual application to the present situation. If the case had not been removed, the Common Pleas Court and the Court of Appeals could not have been expected to depart from the ruling on the precise issue made by the Court of Appeals for Cuyahoga County in the case relied upon by the Circuit Court of Appeals and sought to be eliminated from consideration by Petitioner.

The sole issue raised by this petition for writ of certiorari is whether or not the court below has determined the law of Ohio properly with respect to the statute in question, that is, whether or not the Ohio courts would have relied upon the decision in question despite O. G. C. Sec. 1483. Both the Ohio Supreme Court and a majority of the Ohio Courts of Appeals have declared in effect that the significance of the statute in question is exactly as described by the Circuit Court of Appeals. The Circuit Court of Appeals followed the decision of the Ohio Court of Appeals whose decision would have controlled the case if it had not been removed to the District Court; the Ohio Supreme Court, having overruled motion to certify and denied an appeal of right in the case which the Circuit Court of Appeals followed, is satisfied with the decision relied upon as precedent. The courts of Ohio having clearly indicated

the Ohio law and practice on the question involved and the court below having followed the local law, there is no question before this Court.

Respectfully submitted,

AMOS BURT THOMPSON,

Attorney for Respondent.

C. W. SELLERS,
R. M. MACARTHUR,
THOMPSON, HINE & FLORY,
Guardian Building,
Cleveland 14, Ohio,
Of Counsel.

APPENDIX A.

Ohio Supreme Court cases in which the Court has cited unreported or unofficially reported Ohio appellate court decisions. Since the Ohio Supreme Court does not make a practice of citing inferior Ohio court cases, the following list is necessarily short. No attempt has been made to collect instances where the Supreme Court has examined the Court of Appeals opinion, record, bill of exceptions, or journal entry in the case being reviewed, such as in *Montalto v. Yeckley,* 138 O. S. 314, at 316, 319, 321, 322, 323. Cases where the Court of Appeals opinion cited by the Ohio Supreme Court was unreported are indicated by an asterisk.

Vasu v. Kohlers (1945) 145 O. S. 321, 341, 342.

Inter Ins. Exch. v. Wagstaff (1945) 144 O. S. 457, 459.

State ex rel. Wilms v. Blake (1945) 144 O. S. 619, 625.

**Bauer v. Grinstead* (1943) 142 O. S. 56, 63.

Halkas v. Wilkoff Co. (1943) 141 O. S. 139, 143.

Keesecker v. McKelvey Co. (1943) 141 O. S. 162, 164 (quoting language from Court of Appeals opinion published only in 23 O. L. Abs. 353, at 358).

**Miller v. Jones* (1942) 140 O. S. 408, 410.

Townley v. Miller Co. (1941) 139 O. S. 153, 167.

State ex rel. Mack v. Guckenberger (1942) 139 O. S. 273, 275.

**In re Estate of Reilly* (1941) 138 O. S. 145, 149.

Tullis v. Tullis (1941) 138 O. S. 187, 193, 197.

State ex rel. Hughes v. Cramer (1941) 138 O. S. 267, 271.

**Direct Plumbing Supply Co. v. City of Dayton* (1941) 138 O. S. 540, 542.

**Steiner v. Custer* (1940) 137 O. S. 448, 450.

APPENDIX B.

Cases wherein the Ohio Supreme Court has noted that the Court of Appeals in the case being reviewed had certified its decision as being in conflict with an unreported or unofficially reported Ohio appellate court decision. Cases noting that conflict was found with an unreported decision are indicated by an asterisk.

**Pfoff v. Board of Education* (1945) 146 O. S. 107, 108.

Bobik v. Industrial Commission (1946) 146 O. S. 187, 188.

Lumpkin v. Metropolitan L. Ins. Co. (1945) 146 O. S. 25, 27.

State v. Wells (1945) 146 O. S. 131, 133.

Barlow v. Winters Nat. Bk. & Trust Co. (1945) 145 O. S. 270, 273.

Inter Ins. Exch. v. Wagstaff (1945) 144 O. S. 457, 458.

**Workman v. Republic Mut. Ins. Co.* (1944) 144 O. S. 37, 41.

**Wertz v. Hunter* (1944) 144 O. S. 18, 19.

**Kramer v. Metropolitan L. Ins. Co.* (1944) 144 O. S. 13, 14.

Bauer v. Grinstead (1943) 142 O. S. 56, 59.

**Pfau v. City of Cincinnati* (1943) 142 O. S. 101, 102.

**Stough v. Industrial Commission* (1944) 142 O. S. 446, 447-8 (see 41 O. L. Abs. 400, at 408).

Johnson v. Wagner Provision Co. (1943) 141 O. S. 584, 587-8.

**Damar Realty Co. v. City of Cleveland* (1942) 140 O. S. 432, 433.

**Dubin v. Greenwood* (1942) 139 O. S. 546, 548.

**Hardgrove v. Isaly Dairy Co.* (1942) 139 O. S. 641, 642.

**In re Estate of Reilly* (1941) 138 O. S. 145, 146.

**State ex rel. Strain v. Houston* (1941) 138 O. S. 203, 206.

**In re Estate of Binder* (1940) 137 O. S. 26, 31.

**Geiselman v. Wise* (1940) 137 O. S. 93, 94.

**In re Estate of Butler* (1940) 137 O. S. 96, 102 (and see 118).

**Pugh v. Akron-Chicago Transp. Co.* (1940) 137 O. S. 164, 165-6.

Petro v. Donner (1940) 137 O. S. 168, 174.

B. & O. R. Co. v. Kepner (1940) 137 O. S. 409, 411.

Duncan v. John Hancock Mut. L. Ins. Co. (1940) 137 O. S. 441, 444.

Auto Finance Co. v. Munday (1940) 137 O. S. 504, 509.

APPENDIX C.

List of cases, decided since *Bevan v. Century Realty Co.* (1940) 64 O. App. 58, 65 (upon which Petitioner relies), where Ohio Courts of Appeals have cited and relied upon Ohio appellate court decisions which were either unreported or were unofficially reported. Instances where an *unreported* case was relied upon are indicated by an asterisk. (Note: Volume 76 and that part of Vol. 77 of Ohio Appellate Reports which has been published appear only in advance sheets. Citations to these cases in the Northeastern Reporter are also given.)

City of Cincinnati v. Wright (1945) 77 Ohio App. 261, 268.

State ex rel. Heck v. Sucher (1946) 77 Ohio App. 257, 260.

Wegley v. Snyder (1945) 77 Ohio App. 241, 246.

Wetzel v. Besecker (1945) 77 Ohio App. 235, 239, 64 N. E. 2d 602, 604.

In re Estate of Shafer (1944) 77 Ohio App. 105, 115, 116, 118.

Weinrich v. Franklin S. & L. Assn. (1945) 77 Ohio App. 1, 6, 7, 9, 63 N. E. 2d 38.

Weis v. Weis (1945) 76 Ohio App. 483, 487, 65 N. E. 2d 300.

Kercher v. City of Conneaut (1945) 76 Ohio App. 491, 503, 511, 65 N. E. 2d 272.

Burt v. City of Cleveland (1945) 76 Ohio App. 451, 461, 62 N. E. 2d 274, 278.

Benson, Admrx. v. Rosine (1945) 76 Ohio App. 439, 443, 64 N. E. 2d 845, 847.

State ex rel. Caton v. Industrial Commission (1945) 76 Ohio App. 249, 251, 61 N. E. 2d 806, 807.

Plessinger v. Bireley (1945) 76 Ohio App. 183, 188, 62 N. E. 2d 720, 722.

Brown v. Pennsylvania R. Co. (1945) 76 Ohio App. 171, 175, 61 N. E. 2d 163, 164.

Commercial Credit Corp. v. Wasson (1944) 76 Ohio App. 181, 182, 63 N. E. 2d 560.

In re Estate of Kleinhen (1944) 76 Ohio App. 122, 126, 128, 63 N. E. 2d 315, 318, 319.

Zook v. Dempsey (1944) 76 Ohio App. 147, 149, 65 N. E. 2d 80, 81.

Heath v. Kozier (1945) 76 Ohio App. 89, 93, 61 N. E. 2d 728, 729.

State ex rel. Crabtree v. Eichelberger (1945) 76 Ohio App. 108, 110, 61 N. E. 2d 818, 819.

Reeves v. Frank Co. (1945) 76 Ohio App. 1, 7, 62 N. E. 2d 886, 889.

Shedenhelm v. Myers (1944) 76 Ohio App. 28, 33-4, 63 N. E. 2d 34, 37.

Luebkeman v. Luebkeman (1945) 75 Ohio App. 566, 572.

•*In re Estate of Hedges* (1943) 75 Ohio App. 518, 525.

Noel v. Fetter (1943) 75 Ohio App. 419, 422.

State ex rel. Beane v. Krebs (1945) 75 Ohio App. 427, 434.

Barlow v. Winters National Bank (1944) 75 Ohio App. 392, 393.

Lumpkin v. Metropolitan Life Ins. Co. (1945) 75 Ohio App. 310, 314.

•*Royalty v. Southeastern Greyhound Lines* (1945) 75 Ohio App. 322, 326.

Schaefer v. Cincinnati St. Ry. Co. (1945) 75 Ohio App. 288, 294.

In re Estate of Black (1944) 75 Ohio App. 294, 298.

Taylor v. Continental Cas. Co. (1945) 75 Ohio App. 299, 301-2.

Turner v. Central Outdoor Ad. Co. (1944) 75 Ohio App. 105, 115.

•*Phillips v. Industrial Commission* (1944) 75 Ohio App. 131, 135.

In re Estate of Seidensticker (1944) 75 Ohio App. 73, 87.

Farm Bureau Mut. Auto. Ins. Co. v. Alms & Doepke Co. (1944) 75 Ohio App. 88, 92.

First Discount Corp. v. Daken (1944) 75 Ohio App. 33, 37.

Suiter v. Suiter (1944) 74 Ohio App. 44, 45, 52.

Krovosucky v. Industrial Commission (1943) 74 Ohio App. 86, 90.

Vance v. Hower Corp. (1944) 74 Ohio App. 99, 104.

•*Cummins v. Muskingum W. C. District* (1943) 74 Ohio App. 122, 125, 126, 127, 129.

Simpson v. Springer (1943) 74 Ohio App. 142, 144.

Kurtz v. City of Columbus (1944) 74 Ohio App. 173, 180.

State v. Hainbuch (1943) 74 Ohio App. 193, 197.

•*Vining, Admr. v. Stetler* (1943) 74 Ohio App. 239, 243.

Beach v. Rowekamp (1943) 74 Ohio App. 251, 253.

Skinner v. Brooks (1944) 74 Ohio App. 288, 291.

•*Armbruster v. City of Middletown,* 74 Ohio App. 321, 327.

Thompson Heating Corp. v. Hardware Ind. Ins. Co. (1944) 74 Ohio App. 350, 353.

Shriner v. Price, Exr. (1944) 74 Ohio App. 373, 378.

Andwur M.-L. Co. v. Muhrbach (1944) 74 Ohio App. 387, 390.

Hines v. City of Bellefontaine (1943) 74 Ohio App. 393, 414, 418.

Moore v. Travelers Ins. Co. (1944) 74 Ohio App. 420, 424.